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IN THE

Supreme Court of the United States

OCTOBER TERM—1958

No. 511

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the S/T "RINCON HILLS", and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Petitioners,

against

The steamtug "LONG BRANCH", the RAILWAY CARFLOATS Nos. 61 and 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the steamtugs "AJAX" and "BIAX", the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents.

(and three related causes)

BRIEF OF RESPONDENT, METROPOLITAN SAND & GRAVEL CORPORATION, IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinions of Courts Below.

The opinion of the District Court (CLANCY, D. J.) dismissing the libel is reported in summary in 1956 A. M. C. 1723, and is not otherwise reported. It is printed in Petitioners' Appendix A, pages 1a-13a.

The opinion of the United States Court of Appeals for the Second Circuit, Circuit Judges MEDINA, LUMBARD and WATERMAN, is reported in 258 F. 2d 757, and is also printed in the Petitioners' Appendix B, pages 1b-35b.

Respondent, Metropolitan Sand & Gravel Corporation, filed a petition for rehearing which was denied on September 9, 1958, copies of which petition have been filed herein.

The judgment is set forth in Petitioners' Appendix at pages 36b, 37b.

Jurisdiction.

Jurisdictional requirements are set forth in the petition.

Questions Presented.

Petitioners pose three questions. The first two, insofar as this respondent is concerned, deal with the alleged non-proven failure of the respondent, Metropolitan Sand & Gravel Corporation, to provide its vessel with current tables, not required by law. The third question asks the Court to overrule the settled and long-standing concept of a "dominant mind" expressed by Justice HOLMES in *Liverpool, Brazil & River Plate Steam Navigation Company* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48, 64 L. Ed. 130, 40 Sup. Ct. Rep. 66, which is to the effect that in a cause of damage caused by a tug and tow, only the tug is liable if the tow, although attached to the tug, was not guilty of any fault or negligence upon its part.

Respondent, Metropolitan Sand & Gravel Corporation, by cross-petition filed herein and bearing No. 564, has asked the Court, that it be permitted to present the question as to whether or not respondent, Metropolitan Sand & Gravel Corporaion's right to limitation was properly arrived at and considered by the Court of Appeals, which primary question should be determined prior to the secondary question of limitation of liability.

Statement.

The petitioners in their statement employ a highly selective approach to the facts. In the interest of accuracy respondent, Metropolitan Sand & Gravel Corporation, should be permitted to show that the respondent, Metropolitan Sand & Gravel Corporation's tow did not block the range or otherwise embarrass the navigation of the S/T *Rincon Hills*.

POINT I.

The use of the words "wilful fault" does not have the meaning claimed for them by petitioners.

Petitioners' argument that the Court of Appeals was substituting a new standard of fault under the Limitation of Liability Act is without merit. The opinion of the Court of Appeals clearly demonstrates that the respondent, Metropolitan, was wholly without fault insofar as the furnishing of charts and current tables is concerned. No part of its opinion could be clearer. The Court of Appeals stated:

> "Taking the evidence as a whole we think both the railroad and Metropolitan acted reasonably in committing the navigation of their tugs to these two men of many years experience towing the very waters involved in this case without making further provision for either charts or current tables" (Petitioners' App., p. 28b).

This is unmistakably a holding of no fault on the part of the respondents. The subsequent use of the term "wilful fault" in the Court's opinion although perhaps inappropriate can by no means be construed to indicate that the Court was adopting a new or different basis of liability under the Limitation of Liability Act. The evidence in the case did not pose the question whether respondents were guilty of ordinary fault or wilful fault.

Rather the question was posed were respondents guilty of any fault. This question was categorically answered by the Court of Appeals in the negative.

Captain Hutton, who handled the wheel of the tug at the time of the grounding was a licensed master for thirty-five years and the holder of a pilot's license for New York Bay, Harbor, North River, East River, Staten Island Sound, North Bay, Hackensack, Passaic and Raritan Rivers, and for the six years immediately preceding the occurence was towing sand scows through the same waters (R. 3550-3551), was familiar with the existing currents, the times of high and low water, the difference between high and low water at the Battery and Hell Gate, and the change of current occurring at practically the same time both at the Battery and at Hell Gate. His testimony was in accordance with the information contained in Government publications. Captain Hutton definitely testified that he had the Government tide tables aboard his vessel and that they were furnished by the respondent, Metropolitan Sand & Gravel Corporation (Met. App. 109). Mr. Tangredi, the head of the Marine Department of the respondent, testified that he had furnished tide tables to the tug (Appellants' App. 345a). The captains were authorized to buy any and all charts that they needed and were reimbursed by the company. The tugs originally had been equipped with a complete and full set of charts and Mr. Tangredi testified that an old chart would not be disposed of until a new chart had been purchased to replace the old chart. This procedure resulted in the tug having a complete set of charts aboard at all times (Appellants' App. 344a, R. 3919-3920).

There is no statute or regulation of any kind that requires that a tug operating in local waters have current tables or charts aboard. A licensed pilot, as a prerequisite to obtaining his license, must prove his familiarity with the current, and the other physical features of the waters for which he is licensed.

POINT II.

No confusion exists concerning the decision of this Court in *Liverpool, Brazil & River Plate Steam Navigation Company* v. *Brooklyn Eastern District Terminal*, *supra*.

Petitioners' theory that confusion surrounds the decision of this Court in *Liverpool, Brazil & River Plate Steam Navigation Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48, is founded upon the failure of petitioners to recognize the significance and full meaning of the distinction between actions *ex contractu* and actions *ex delictu*. The petitioners call the distinction tenuous; yet, judicially the distinction has been carefully maintained as American Law and is still carefully maintained. The basic rule in limitation cases is that only the offending or dominant vessel's value need be surrendered. The decision in the *Liverpool* case settled the issue and it has since been followed consistently, and it was in the decision of the Court of Appeals in this case. That a different rule pertains in cases where contractual promises are involved was first authoritively noted by this Court in *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326. The precept was there laid down that the promissor or vessel owner must surrender the entire flotilla as a condition to being granted limitation in a claim arising out of a breach of the contractual undertaking. In so holding this Court carefully preserved the rule of the *Liverpool* case in pure tort situations. The key to the entire problem is simply this: in a tort case the question is posed, what constitutes the offending vessel? In a contract action, on the other hand, the question is, what vessels were involved in the contractual undertaking?

The reasoning underlying the line of decisions beginning with *Sacramento Nav. Co.* v. *Saltz*, *supra*, is not confusing, as petitioners would suggest, but is clear and logical. The extent of liability must be related to the

contractual obligations involved. Thus, in a case where a shipper entrusts his property to a tug, barge flotilla, he is relying upon performance of the entire flotilla. This was the essence of the promise made to him by the owner of the flotilla in accepting his property. Similarly, when a servant contracts employment with a master, the servant relies upon the entire venture in which the master is engaged, rather than a part of it. Cf. *Standard Dredging Co.* v. *Kristiansen*, 67 F. 2d 548. In tort cases, on the contrary, there is no such promise and reliance, and as stated in *Sacramento Nav. Co.* v. *Salz* (*supra*) the only issue is what constitutes the offending vessel.

After asserting that confusion surrounds the Liverpool decision petitioners urge a modification or reversal of that ruling for no more important reason, as we read it, than to effect a more substantial recovery. By taking words out of the context of the opinion of the Court of Appeals petitioners insidiously infer that "the tug and tows seriously obstructed the navigation of the tanker"; and that "the tows were at fault for not keeping away from the immediate vicinity of the range, where they interfered with the navigation of the tanker" (Petition, p. 12). This is not at all the holding or decision of the Court of Appeals. The Court of Appeals specifically said: "But, in the case before us, as in Liverpool, no fault whatever is attributable to the sand scows or to the car floats" (Appellants' App., p. 35b).

The quotes taken from the Court's opinion set forth in the petition were obviously intended by the author of the Court's opinion to mean tows as they were navigated and controlled by the tug—the dominant mind of the flotilla. A modification or reversal of Liverpool, as urged by petitioners, would clearly do violence to legislative intent. The statute uses the words "such vessel". The Liverpool decision makes it clear that "such vessel" means the offending vessel and no other vessel. No compelling

reason whatever has been advanced by petitioners for the promulgation of any different rule than expressed in the Liverpool decision and so consistently followed ever since.

POINT III.

The argument based on uniformity of International Maritime Laws is inappropriate.

The question concerning the extent to which a shipowner may limit his liability has from the very beginning been different in England and in the United States. There has never been uniformity. Mr. Justice BRADLEY in *Norwich & N. Y. Trans. Co.* v. *Wright*, 80 U. S. 104, 127 (1872) pointed out that the Act of 1851 adopted the rule of Maritime Law as contradistinguished from that of the English statutes on the same subject.

In recent years the question of uniformity has been the subject of diplomatic meetings and conventions. Only last year invitations were issued by the Belgium Government to various maritime countries, including the United States and United Kingdom, to send delegates to an international diplomatic conference to be held at Brussels, Sept. 30 to Oct. 10 to consider the Madrid proposed draft relating to, among other things, limitation of liability.

Leonard J. Matteson, Esq., ex-president of the Maritime Law Association of the United States, in his report to the Association, dated April 24, 1958, after comparing the U. S. Law with English Law and the Convention concluded that uniformity relating to shipowners limitation of liability was not achieved.

His comparison of U. S. Law and English Law concerning Claims included and Amount of Limitation follows:

> "*U. S. Law*
>
> CLAIMS INCLUDED
>
> All claims arising in course of the voyage even though more than one occasion of liability.

AMOUNT OF LIMITATION

Value of the ship at the end of the voyage plus gross freight and passage money earned on voyage. With respect to 'seagoing vessels' only, share of personal injury and death claims must be increased up to $60 per gross ton without deduction of engine space, if required for full payment.

NOTE: The U. S. system is based on the conception that a shipowner sending his ship on a voyage, considered to be a venture of unusual hazard, having performed his personal duties in providing a well found ship, should not be required to risk more than his investment in the venture. This system stems from prior European systems permitting abandonment some of which still exist at least in modified form. These systems have at least a rational foundation.".

"*English Law*

CLAIMS INCLUDED

Claims arising on each distinct occasion.

AMOUNT OF LIMITATION

In case of loss of life or personal injury, either alone or with property damage, £15 ($42) per registered ton plus engine space. In respect of property claims, whether also personal claims or not, £8 ($22.40) per ton. Loss of life and personal injury claims paid primarily out of £7 and share in £8 after exhausting £7.

NOTE: The English system of limitation is unrelated to the earlier continental systems of abandonment. See Marsden on Collisions, 10th Ed., p. 172 et seq. Prior to 1862, the system was based on sound value plus freight, with a minimum of £15 for loss of life and personal injury. By the Act of 1862 the present limits were established as a rough average value of all ships, to save the difficulty of individual valuations. With the passage of time all relationship to value has disappeared and the figures have

become arbitrary and ridiculously low. They were never based on any theory other than the abridgement of the 'natural right of justice * * * for political reasons'. Dr. Lushington in The Amalia (Brown & Lush. 151)."

It is self evident that if uniformity is to be achieved between the United States and Canada the proper method is by treaty or as suggested in *Butler* v. *The Boston & Savannah Steamship Company*, 130 U. S. 527, 32 L. Ed. 1017 (1889) by Act of Congress.

The petitioners in effect urge the unilateral judicial adoption of the law of a foreign jurisdiction, not in accord with the American and European system, solely for the purpose of effecting a more substantial recovery to themselves.

Conclusion

For the foregoing reasons respondent, Metropolitan Sand & Gravel Corporation, respectfully prays that the petition for a writ of certiorari be denied; or, in the alternative, that the petition and the cross-petition filed by respondent, Metropolitan Sand & Gravel Corporation, be considered and that this Court exercise its proper right of supervision over the federal judiciary system in order to correct a decision which is plainly wrong and represents a gross miscarriage of justice.

Respectfully submitted,

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